ME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

NO. 952

J. H. RUTTER REX
MANUFACTURING COMPANY, INC.
Cross-Petitioner

versus

NATIONAL LABOR RELATIONS BOARD and
AMALGAMATED CLOTHING WORKERS OF
AMERICA, AFL-CIO
Respondents

## CROSS PETITION FOR A CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Cross-petitioner prays that a cross-writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit and in support of its petition shows:

## I. OPINIONS BELOW AND JURISDICTION

1. The opinion of the United States Court of Appeals for the Fifth Circuit appears in 399 F. 2d 356 (5th Cir. 1968), and is printed in Appendix A of the petition for

certiorari filed by the Board. The decision of the National Labor Relations Board, which was enforced in part by the Fifth Circuit Court of Appeals, appears in Appendix D of the petition for certiorari filed by the Board.

2. The jurisdiction of this court is invoked under 28 U. S. Code § 1254 (1). The opinion of the Court of Appeals was entered on July 23, 1968, and the petition for rehearing en banc filed by the Board was denied on October 1, 1968. A copy of the order denying the petition for rehearing is printed in Appendix C of the Board's petition. Copies of the Court's orders extending the time for filing this cross-petition are attached hereto as APPENDIX A.

## II. QUESTIONS FOR REVIEW

1. Should remedial orders of the National Labor Relations Board in an 8(a)(5) (29 USC § 158 (a)(5)) case requiring a company to reinstate strikers immediately upon receipt of their applications for reinstatement, and requiring payment of backpay beginning five days after the receipt of each application, be interpreted to require payment of backpay on the basis of individual applications received prior to the date of the order, where the order does not refer to applications which preceded the order and issues on a record which does not fix the dates upon which applications were received?

2. Where a certified union submits a blanket application for reinstatement on behalf of a list of striking employees at the termination of an unfair labor practice strike, some of whom are available to return to work and some of whom are not, does the union's agreement with

the company that the strikers who desire to return to their jobs will demonstate their availability by coming in person to the company's personnel office place upon the National Labor Relations Board, in a backpay hearing, the burden of proving the availability of those strikers for whom the union applied for reinstatement who do not comply with the agreement?

3. Does the National Labor Relations Board have an obligation to cooperate with an employer against whom it has issued a reinstatement and backpay order in interpreting and implementing the order?

## III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

The case involves the interpretation and application of an order issued by the National Labor Relations Board under 29 USC § 160 (c), printed as APPENDIX B, and whether the manner in which the order was enforced by the Court of Appeals violates the minimum requirements of procedural due process.

## IV. STATEMENT OF THE CASE

In April of 1954, the Amalgamated Clothing Workers of America called a strike at cross-petitioner's New Orleans plant. The strike terminated in April of 1955. In March of 1955, while the strike was still in progress, the National Labor Relations Board conducted a hearing on a refusal to bargain charge filed by the union. The hearing took place during the strike and the sole issue was whether cross-petitioner had illegally refused to bargain with the union. No reinstatement problems had yet arisen, and there was no evidence indicating that applications for

reinstatement had been submitted by or on behalf of any of the strikers. On February 13, 1956, the Board issued its order directing that cross-petitioner "upon application, offer immediate and full reinstatement to their former or substantially equivalent position to all those employees who went on strike on April 21, 1954". The order, copy of which is printed as APPENDIX C, further required the payment of backpay beginning five days after the date of each application, if the applicant was not by that day reinstated. All of the applications upon which the Board has predicated backpay awards in this case were submitted prior to the date of the Board order.

The Board's order was enforced by the Court of Appeals for the Fifth Circuit in June of 1957. On November 7, 1957, cross-petitioner's counsel advised the Board (R 957):

> "Our client has already complied [redacted] visions of the decree, and is presently engaged in bargaining with the representatives of the Amalgamated Clothing Workers of America. If any instance of a failure to fully comply with the order is brought to your attention, we would appreciate your contacting us promptly so that such corrective measures as may be necessary can be immediately taken in order to assure full compliance with the decree."

The Board did not respond to this letter. Although it is the Board's practice to suggest voluntary compliance with its orders, particularly in matters involving backpay, the Board made no effort to obtain voluntary compliance in this case, made no effort to cooperate with cross petitioner in the complex problems involved in implementing the order as enforced by the Court of Appeals, and de-

layed until November 4, 1961 the filing of a backpay specification, asserting a claim which by that time amounted to $342,000. The Board's decision in the backpay hearing was presented to the Court of Appeals on petition for review filed pursuant to 29 USC § 160(f) and a cross-petition for enforcement under 29 USC § 160(e).

## V. ARGUMENT OF THE FIRST QUESTION

The hearing on the refusal to bargain charge was held while the strike was still in progress. The order which issued on February 13, 1956 was fashioned to remedy the violation reflected in the record before the Trial Examiner, and since at the time of the hearing the strike was still in progress, the remedial order was framed to remedy a violation of Section 8(a)(5) of the Act by requiring cross-petitioner to bargain with the union and to reinstate immediately upon application those strikers who applied for reinstatement when the strike ended. In framing its order, the Board required that reinstatement follow immediately upon application in order to avoid the backpay penalty. The order did not by its terms provide for the reinstatement of strikers who applied for reinstatement before the order issued, although it might have done so if that is what the Board intended. On February 13, 1956, when the Board order issued, it was inherently impossible to reinstate *immediately upon application* the strikers who had applied for reinstatement as early as April of 1955. It must be assumed that the order was one with which the cross-petitioner could comply.

Unless the wording of the order contemplated applications after the date of the order, it was impossible to comply with the order on the date of its issuance. The

order should be construed as one which could be obeyed by immediately reinstating anyone who applied.

All of the applications upon which the backpay order is premised were submitted after the strike ended and before the date of the order (See application dates in backpay specification, R. vol. II, pages 754-902). The Board must concede that its order does not, by its verbiage, state an obligation to reinstate on the basis of applications which preceded the order, and so the Board says in its Supplemental Decision and Order (R 102):

> "The Board's order is in its usual form and is clearly drawn and *intended* to include a requirement for reinstatement and backpay for those employees *who might already have made proper application for reinstatement at the time of the issuance of the order . . .*". (emphasis supplied)

The Board relies on what it says was intended by the order rather on the language of the order.

The determination that the strike was an unfair labor practice strike was not made until the Board decision and order of February of 1956. In enforcing the order the Court of Appeals stated:

> "The final order declaring it to be an unfair labor practice strike cannot be obtained unless the hearing on the main issues can end. *Until that is done, there is no basis for an order of reinstatement, and nothing upon which, as a foundation for a claim for reinstatement with possible restitution, the employee could make a demand for reinstatement.*" *NLRB v. J. H. Rutter Rex Mfg. Co., Inc.*, 245 F.2d 594, 598 (5th Cir. 1957) (emphasis supplied).

The Court of Appeals could not have said more clearly that the Board order of February 13, 1956 was a condition precedent to the submission of an effective application for reinstatement. If the Court in enforcing the order asserted that the order was a condition precedent to the submission of an effective application for reinstatement, and if that order required reinstatement immediately upon application, without specific reference to applications received prior to the order, backpay liability should not be imposed upon cross-petitioner on the basis of applications which were submitted before the order issued simply because the Board intended what it did not provide for in the order.

The Board asserts that the order is "in its usual form" but in this case has attempted to apply that form in an unusual manner which finds no support in any of the authorities heretofore cited by the Board. The Trial Examiner and the Board "interpreted" the order to require the payment of backpay from the dates of applications which preceded the order, which were not fixed by the order, and which could not be determined by reference to the evidence in the record from which the order emanated. The Board has cited no case in any of its briefs in which retroactive effect has been given to a reinstatement order except in cases arising under 29 USC § 158 (a) (3) involving discrimination occurring on a date fixed by testimony before the Board, or in refusal to bargain cases in which the record at the hearing before the Board reflects an application for reinstatement from the striker or strikers on a specific date. In such cases the Board decision provides for backpay to run from a date certain fixed by the evidence in the hearing in which the order issues. An employer faced with an order which by its

terms provides for the running of backpay from a specific date before the date of the order has its obligation clearly defined. In the present case the order issued on a record made during the continuance of the strike, before any applications for reinstatement were submitted, and obviously concerned itself with a reinstatement problem which would arise in the future when the strike ended. For this reason the order was couched in language which required cross-petitioner to do something in the future, i. e., reinstate immediately upon application those strikers who applied for reinstatement. The Trial Examiner's intermediate report and the Board order, 115 NLRB 388, were clearly concerned with defining cross-petitioner's obligation at such time in the future as applications for reinstatement might be submitted.

The Board order contained only a statement of the right of reinstatement, naming no names and fixing no dates, and stated in language which, if the words of the order are given their customary literal meaning, defines a future obligation, namely, the obligation to immediately reinstate upon receipt of an application. In enforcing the order the Court of Appeals said that until the Board found that the strike was an unfair labor strike, which it did on February 13, 1956, the date on which its reinstatement order issued, there was "nothing upon which, as a foundation for a claim for reinstatement with possible restitution, the employee could make a demand for reinstatement" (245 F. 2d page 598). The language of the enforcing judgment of the Circuit Court supports cross-petitioner's contention that the Board's opinion and order of February 13, 1956 was a *sine qua non* for the

submission of an effective application for reinstatement under the terms of the order.[1]

Against the background of an order which by its terms referred to future compliance, and an enforcing judgment by the Court of Appeals which stated that the Board opinion and order of February 13, 1956 was a condition precedent to the submission of an effective application for reinstatement by a striker, cross-petitioner, through its counsel, addressed its letter of November 7, 1957 (R 957) to the Board.[2] The Board did not respond to this letter, made no attempt to work out the details of compliance as its rules contemplate, but simply permitted the backpay claims to accummulate until November of 1961 when the backpay specification was filed. The penalty imposed by the Board in this case is perhaps in excess of the penalty for criminal contempt which may have been imposed if cross-petitioner, instead of trying to comply with the Board order,[3] had adamantly disobeyed it. The order should be strictly construed. Cross-petitioner's liability should not be based upon an "interpretation" of what the Board "intended" by its order, but upon a strict construction of the verbiage of the order. *NLRB v. Express Publishing Com-*

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[1]The question raised by cross-petitioner does not concern the Board's power to have issued a retroactive order under the circumstances of this case, although to have done so would have found no support in prior Board practice. Rather the question is whether the Board order by its terms imposed the obligation which the Board claims to have intended. Similar circumstances were present in *NLRB v. Hecks, Inc.*, 388 F. 2d 668 (4th Cir., 1967) and in *Republic Steel Corp. v. NLRB*, 114 F. 2d 820 (3rd Cir., 1940).

[2]Quoted on page four, supra.

[3]The backpay specification appearing at R vol. 2 p. 742 reflects that all but 70 of the 600 employees on the payroll had been reinstated or had refused reinstatement at the time the specification was filed. Furthermore, the Board's contention that 70 employees had been refused reinstatement without cause did not prove to be correct, for the Board later found that cross petitioner was justified in not reinstating many of the strikers who were not reinstated.

*pany*, 312 U. S. 426, 61 S. Ct. 693 (1941); *J. I. Case Company v. NLRB*, 321 U. S. 332, 64 S. Ct. 576 (1944); *Regal Knitwear Company v. NLRB*, 324 U.S. 9, 65 S. Ct. 478 (1945).

: As expressed by Justice Stone in *Express Publishing Company*, 312 U.S. at 433:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing."

In *NLRB v. Heck's, Inc.*, 388 F. 2d 668 (4th Cir. 1967), the company operated stores at ten locations and the Board contended that a violation had occurred at one of the stores not mentioned in the Board order. The Board contended that its procedure required the posting of a notice only at the store where the violation occurred but that the cease and desist portion of the order applied to all stores. The court denied the Board's petition to adjudge a respondent in civil contempt of its order on the ground that the order should be limited to its specific terms. The language of the court follows (388 F. 2d at 669-670):

> "Our reluctance to be guided by the Board's procedure is based, however, upon reasons more fundamental than lack of uniform application. We believe the scope of the decree should be limited to its specific terms. It should not be left to implication. Recently we have been reminded, 'The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.'

*International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64. 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967). Rule 65(d), Fed. R.Civ.P., is applicable in reviewing a judgment enforcing an order of the National Labor Relations Board. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13, 65 S.Ct. 478, 89 L.Ed. 661 (1945). The rule wisely requires that every order granting an injunction ' * * * shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained * * *.' The Board's orders, no less than a court's should conform to the rule. *N.L.R.B. v. Express Publishing Co.*, 312 U.S.. 426, 433, 61 S.Ct. 693, 85 L.Ed. 930 (1941).

The respondents, having consented to the decree, do not complain that it does not technically comply with Rule 65(d). Nevertheless the rule's salutory provisions furnish guidance in construing the decree. The trial examiner's observation that the proceedings were limited to the 16th Street store, and the Board's direction to post notices only at the 16th Street store, lead us to construe the decree to apply to the employer's conduct only at that store. The admonition contained in *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 15, 65 S.Ct. 478, 482, 89 L.Ed. 661 (1945), is appropriate:

> 'Enforcement orders are issued to effectuate the purposes of the Act, not for the entrapment of parties, and courts no less than parties desire to avoid unwitting contempts as well as to punish deliberate ones.' "

The Board order here did not clearly require the cross-petitioner to do an impossible thing, i.e., reinstate

"immediately" strikers who had applied as much as a year before the order issued. The Board's failure to clarify what it belatedly claims to have intended by the order until the backpay specification was filed in November of 1961, by which time cross-petitioner was faced with accummulated claims amounting to $342,000, plus interest, constitutes a denial of procedural due process.

The retroactive effect given to the Board order in this case is unprecedented. In APPENDIX D, which is an excerpt from cross-petitioner's supplemental brief in the Court of Appeals, the principal authorities relied upon by the Board are analyzed to demonstrate that they do not support the retroactive interpretation which the Board says it intended in this case. In reply the Board finally asserted that *Florence Printing Company v. NLRB*, 333 F. 2d 289 (4th Cir., 1964), a backpay decision enforced in 376 F. 2d 216 (4th Cir., 1967) (certiorari denied, 389 U.S. 840 (1968), "applies exactly such a retroactive effect under the same circumstances as existed here". After complete analysis and research, the Board cites the *Florence Printing Company* case as the strongest support for its interpretation of the backpay order against cross-petitioner. But *Florence Printing Company* does not support the Board's contention. The case does not indicate that the Board or the enforcing court interpreted the Board order as requiring the payment of backpay from unspecified dates of applications for reinstatement which preceded the order of the Board. On the contrary, the Board and the company *stipulated* the dates from which backpay was to be computed, and *stipulated* the amounts of backpay due to each claimant subject to certain adjustments not

relevant here.[4] The need for the stipulation is an apt illustration of the point urged by cross-petitioner.

A case in which the Board has been guilty of inordinate delay[5] is not one in which to interpret a Board order in an unprecedented manner and contrary to the words of the order to support the backpay awards enforced by the Court of Appeals.

## VI. ARGUMENT OF THE SECOND QUESTION

Cross-petitioner received notice of the termination of the strike by the union's letter of April 5, 1955, which enclosed a list of strikers who allegedly wished to return to their jobs (R Vol. 10, pp. 160-163). This letter requested that the union be informed ". . . when and where these employees should return to work". The union wrote a similar letter on April 8, 1955, closing with the same request (R Vol. 10, pp. 164-165). Cross-petitioner's reply to these letters was mailed on April 11, 1955, suggesting that those strikers desiring to return to work come to cross-petitioner's personnel office at the rate of not more than 20 a day.

The union submitted additional names on April 22 and May 13, 1955, and in each covering letter agreed that "We will have these individuals report to your personnel office as per your instructions of April 11, 1955" (R. Vol. 10, pp. 168-169, 172).

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[4]The stipulation of the parties in *Florence Printing Company* appears at 158 NLRB 775. There is no indication in any of the opinions of the Board or of the Court of Appeals for the Fourth Circuit that the contention raised by cross-petitioner regarding the prospective nature of the Board's order was made by the company or considered by the Board or the Court.

[5]*NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 305 F. 2d 242, 244(5th Cir., 1962); *J. H. Rutter Rex Manufacturing Company v. NLRB*, 399 F. 2d 356, 363 (5th Cir. 1968).

Implementing its agreement to have the strikers make personal application at the plant, the union prepared and gave to the strikers form letters of application addressed to cross-petitioner. These letters bore the signature of a national representative of the union and provided space for the striker to sign and a space to be filled in with the "Application Date" (R Vol. 10, p. 173). The Trial Examiner, affirmed by the Board, found:

> "The Union, in compliance with the Company's request to send the employees in at the rate of 20 a day, notified the employees to go to the plant at intervals. A number of employees testified that they did not attempt to make a personal application for reinstatement until they were notified by the Union to do so. The Examiner finds that the experience of these employees is typical of that of the strikers as a whole who made personal applications for reinstatement shortly after the strike ended." (R. 174-175)

Cross-petitioner contends that the union's agreement to have the strikers who desired to return to work show their availability by making personal application placed upon the Board's General Counsel the burden of proving that a claimant who did *not* come to the personnel office was *available* to return to work in order to establish a right to reinstatement.

In the context of this case, proof of "availability" for work required evidence of the strikers' compliance with the union's agreement requiring personal application, or for those who did not comply with the agreement, evidence of physical readiness and a serious intention or desire to return to work.

Cross-petitioner does not contend that the blanket applications submitted by the union were legally ineffective. But when the union agreed to have the strikers report in person to the personnel office, cross-petitioner was led to expect that the union would do what it agreed to do and was induced to believe that the available strikers would demonstrate their availability by coming to the plant. Those strikers who did not come in were considered as unavailable or as not intending to return to their jobs. In these circumstances, General Counsel should have been required to prove the claimants' availability before the Board found that an obligation to reinstate had been created.

General Counsel relied solely upon the blanket applications and offered no proof of availability. The Board found this sufficient to support a prima facie obligation to reinstate the strikers whose names were submitted by the union (R 178-180) although the Board conceded, as it held in *Efco Mfg., Inc.*, 108 NLRB 245, 33 LRRM 1517, 1518 (1964), that a union may ". . . agree to modify an earlier unconditional group request so as to require individual applications".

Having conceded this point, the Board nevertheless dismissed the contention that the union had modified the blanket applications by agreeing that those strikers intending to return to their jobs would demonstrate their availability. The Board, which believed that it had no obligation to cooperate with cross-petitioner, also felt that the union ". . . was under no legal obligation to facilitate the company's reinstatement task . . ." (R 179). The Court of Appeals ruled simply that the Union letters were "effective notice" and the company should have

"promptly reinstated" the strikers. *J. H. Rutter Rex Manufacturing Company v. NLRB*, 399 F. 2d 356, 361 (5th Cir. 1968). This does not answer cross-petitioners argument because no contention is made that the union letters were not initially legal applications.[6]

The record demonstrates the difficulty inherent in the company's rebuilding and reinstatement task after the year long strike. Availability of personnel was a key factor in the rebuilding program. The union acknowledged this by agreeing to an orderly application procedure and induced the company to believe that available personnel would present themselves at the plant. These circumstances required the union and the applicants to take this further step. Compare *NLRB v. Rice Lake Creamery Company*, 365 F. 2d 888, 896 (D. C. Cir. 1966). General Counsel should not have been permitted to rely solely upon the union's blanket application without evidence of the availability of the claimants to establish an obligation to reinstate.

## VII. ARGUMENT OF THE THIRD QUESTION

The Court of Appeals has enforced in part and denied enforcement in part of the Board's supplemental order of June 3, 1966. The Court's language is as follows:

> "Considering that the employer was in the wrong in 1955 and that the Board was guilty of inordi-

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[6] *NLRB v. Brown & Root, Inc.*, 203 F. 2d 139 (8th Cir. 1953), cited by the Board (R 179-189) and by the Court of Appeals (399 F. 2d at p. 361) is distinguishable, factually and legally. The contention in *Brown & Root* was that the union's blanket application was ineffective The Court disagreed and held that *Brown & Root* could not *insist* upon personal applications (203 F. 2d at p. 139). The distinction between the burden of proof problem as it relates to this case and to *Brown & Root* is that proof of an effective application in this case required evidence of the application *and* availability *because the union agreed that applicants would demonstate their availability.*

> nate delay by doing nothing before March 22, 1960, we are of the opinion that backpay awards for this five-year period satisfy the purposes of the law, with no injustice to the company. We are likewise convinced that no backpay award for any period subsequent to July 1, 1959 should now or hereafter be enforced." (399 F. 2d at 365).

Throughout this litigation cross-petitioner has contended that it was prejudiced, not only by the Board's delay in filing the specification, but also by the Board's failure to discharge its duty to cooperate with cross-petitioner in implementing the order. The Board did not respond to cross-petitioner's letter of November 7, 1957 (R. 957). The Board, with benefit of hindsight, second-guessed what cross-petitioner had done in resolving the complex problems resulting from the applications for reinstatement.

The Board's appraisal of its obligations in the compliance phase of the case was stated as follows:

> "Moreover, the Board was under no obligation to take affirmative steps to call to movant's attention the particulars in which it did not believe movant had complied with the reinstatement obligation imposed by this Court's decree. The decree ordered movant to reinstate 'all those employees who went on strike on April 21, 1954, or thereafter * * *.' Movant could have been under no misapprehension as to what the decree required. Having chosen not to obey the decree *in haec verba*, movant may not now avoid the consequences of its conduct by alleging that the Board was under an affirmative duty, prior to the issuance of a backpay specification, to issue a series of advisory judgments setting out its view

> of the Company's reinstatement obligation as to individual strikers."[7]

The Board has taken the position that it was under no affirmative duty to advise cross-petitioner regarding its obligations under the order. The Board's enforcement officer testified that customarily an attempt is made to settle backpay questions prior to the filing of a backpay specification, but that in this case, despite cross-petitioner's letter of November 7, 1957 seeking the Board's cooperation, no effort to settle the backpay issues was made before the specification was filed (R 1019-1022).

The Board's rules contain the following:

> "Sec. 101.13. Compliance with Board decision and order. Shortly after the Board's decision and order is issued, the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order." (29 CFR § 101.13)
> "Sec. 101-15. Compliance with court decree. After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the regional office of the respondent's efforts to comply." (29 CFR § 101.15)

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[7]This is an excerpt from page 30 of the Board's brief in *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 305 F. 2d 242 (5th Cir., 1962). At this stage of the case it was the Board position that there could be no misapprehension about what its order required, and that it was cross-petitioner's obligation to obey the decree *in haec verba* or literally. In the present state of the case the Board's position has changed to a contention that cross-petitioner is being "too literal" in objecting to a retroactive interpretation of the order. (See transcript of argument before Court of Appeals, R. Vol. 11, p. 62-63, 66).

In this case the Board did nothing until March 22, 1960, when the Board, admitting that it was "in the position of having delayed action in this matter over a period of several years", requested cross-petitioner's cooperation in developing information which the Board considered pertinent to the compliance question (R 958). The Board's inaction was in violation of its rules and of the requirement of the Administrative Procedure Act that every agency proceed with reasonable dispatch to conclude the matters before it.[8] This Court stated in *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 61 S. Ct. 845, 852 (1941):

> "The power with which Congress vested the Board implies responsibility — responsibility of exercising its judgment in employing statutory powers."

Citing *Phelps Dodge Corporation*, the Court of Appeals for the Fourth Circuit, in *Wallace Corp. v. NLRB*, 159 F. 2d 952 (4th Cir. 1947), comments on the manner in which the details of compliance must be worked out following a Board order:

> "Such general orders are analogous to interlocutory judgments of courts fixing liability but leaving for future determination questions as to amounts of liability; and our decrees affirming or enforcing them are analogous to our affirmance of interlocutory judgments on appeal. After the general order of the Board for backpay and reinstatement is affirmed or ordered enforced by us, the Board must work out the details of reinstatement and of the amounts to be paid as backpay under the general

[8] 5 USCA § 1005 (a) (carried forward in material respects in the 1966 amendments, 80 Stat. 378, 5 USC § 555).

> provisions of the order. This can ordinarily be done by negotiation; but, if controversy arises, the facts must be found by the Board, the body to which Congress has committed the administrative process. *Phelps Dodge Corp. v. NLRB*, 313 US 177." (159 F. 2d at p. 954)

The Board's failure to discharge promptly its affirmative duty to work out the details of compliance compounded the difficulty which the retroactive interpretation of the order imposed upon cross-petitioner. The Board had an affirmative obligation to cooperate with cross-petitioner in the compliance phase of the case. The Board breached its obligation and cross-petitioner should not bear the weight of the Board's fault.[9]

## VIII. REASONS FOR GRANTING CROSS-WRIT

The Court of Appeals, to the extent that it enforced the Board order, has departed from the requirement of *NLRB v. Express Publishing Company*, supra, that the order state with reasonable specificity what cross-petitioner was required to do. Furthermore, the extent, if any, to which the Board is required to go in cooperating with a respondent in resolving the compliance problems raised by the order has not heretofore been clearly defined by this court. The requirements of procedural due process have not been met when the Board, after the fact, interprets its order retroactively and compounds the impact of that interpretation by its delay and its failure to cooperate in implementing the order.

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[9]Cf. *NLRB v. Bird Machinery Co.*, 174 F. 2d 404 (1st Cir. 1949); *Dunn v. Retail Clerks International Ass'n*, 307 F. 2d 285 (6th Cir. 1962); *Waterman S. S. Corp. v. NLRB*, 119 F. 2d 760 (5th Cir. 1941).

## IX. CONCLUSION

It is respectfully submitted that this cross-petition should be granted and the decree of the Court of Appeals, to the extent that it granted enforcement of the Board order, should be reversed.

Respectfully submitted

/s/ Peter H. Beer

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Of Counsel:

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## CERTIFICATE

It is certified that three copies of the foregoing cross-petition for a cross-writ of certiorari have been served by mail, by depositing the same in a United States mail box, first class airmail postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C. 20570

Jackson & Hess —
Attention Mr. Ralph N. Jackson
1411 Decatur Street
New Orleans, Louisiana 70116

Mr. Jacob Scheinkman
15 Union Square West
New York, New York 10003

Mr. James J. Graham
46 Washington Mews
New York, New York 10003

New Orleans, Louisiana, January 14th, 1969.

/s/ Peter H. Beer

PETER H. BEER
Counsel for Cross-Petitioner

## APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No._____

J. H. RUTTER REX
MANUFACTURING COMPANY, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

Upon Consideration of the application of counsel for petitioner(s).

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 9, 1969.

/s/ Wm. J. Brennan, Jr.

---

*Associate Justice of the Supreme Court of the United States*

Dated this 19
day of December, 1968.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.....

J. H. RUTTER REX
MANUFACTURING COMPANY, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

---

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

---

Upon Consideration of the application of counsel for petitioner(s).

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including January 16, 1969.

/s/ Wm. J. Brennan, Jr.

---

*Associate Justice of the Supreme Court of the United States*

Dated this 26
day of December, 1968

# APPENDIX B

Title 28, United States Code, Section 160(c).

**Reduction of testimony to writing; findings and orders of Board**

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the

order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

# APPENDIX C

National Labor Relation Board Order of February 13, 1956, 115 NLRB 388.

## ORDER

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, J. H. Rutter-Rex Manufacturing Company, Inc., New Orleans and Franklinton, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Clothing Workers of America, AFL-CIO, as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) Threatening to refuse to bargain with the abovementioned Union or to close the plants or to discharge employees for striking, soliciting strikers to return to work, inquiring of strikers in an unlawful manner concerning the Union's activities, promising benefits, or unilaterally granting benefits without consulting the Union.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Amalgamated Clothing Workers of America,

AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Amalgamated Clothing Workers of America, AFL-CIO, as the exclusive representative of the employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went on strike on April 21, 1954, or thereafter, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired on or after that date, and make such applicants whole for any loss of pay suffered by reason of the Respondent's refusal, if any, to reinstate them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."[5]

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[5]We do not adopt the Trial Examiner's modification of our conventional order of affirmative remedial action for unfair labor practice strikers. See *Buffalo Arms, Inc.*, 110 NLRB 816. We refer particularly to the Trial Examiner's attempt to provide for hypothetical future situations, such as the Respondent's business situation after the close of the hearing when the strikers might apply for reinstatement or the computations of vacation pay. Such questions of compliance may not in fact arise, but if they should they will be adjusted at the compliance stage of this case.

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order.

(d) Post at its plants in New Orleans and Franklinton, Louisiana, copies of the notice attached hereto and marked "Appendix A."[6] Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Fifteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Members Murdock and Bean took no part in the consideration of the above Decision and Order.

[6] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

# APPENDIX D

Excerpt from Brief of J. H. Rutter Rex Manufacturing Company, Inc., to the United States Court of Appeals for the Fifth Circuit (Reported at 399 F. 2d 356).

An analysis of the cases cited by the Board shows that they do not support the Board's retroactive interpretation of the order:

In *Buffalo Arms, Inc.*, 110 NLRB 816, there was an order issued in language similar to the order enforced in this case, but there is nothing whatsoever in the Board decision which supports the contention that the order was implemented retroactively and made to cover applications for reinstatement before the date of its issuance. It is interesting to note that in *Buffalo Arms* the Trial Examiner recommended that the Board reserve the right to modify the reinstatement and backpay provisions of the order if made necessary by future circumstances. Respondent points out, at page 66 of its original brief, that the General Counsel could have, but did not, seek to clarify the order against Rutter Rex to have it provide for reinstatement of strikers who applied before February 13, 1956, if that is what the Board intended. in the *Buffalo Arms* case, enforcement of the order was refused, *Buffalo Arms, Inc. v. NLRB*, 224 F. 2d 105 (2nd Cir. 1955), and the order was never implemented at all.

*NLRB v. Remington Rand, Inc.*, 97 F. 2d 195, cited at page 30 of the Board's brief, does not appear to pertain to the issue here under discussion.

*Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, cited at page 31 of the Board's brief, is simply authority for the

proposition that unfair labor practice strikers are entitled to reinstatement, a proposition which is of course not questioned by respondent here.

*NLRB v. Crosby Chemicals, Inc.*, 188 F. 2d 191, cited at page 31 of the Board's brief, involved an order which specifically based the right to backpay on the employer's discriminatory refusal to reinstate certain strikers on a date referred to in the evidence in the record of the hearing in which the order issued. Enforcement of the Board order was denied by this court because the strikers' offer to return to work was not unconditional.

*NLRB v. Fitzgerald Mills Corp.*, 313 F. 2d 260, is one of several cases cited at page 32 of the Board's brief in support of the proposition that unfair labor practice strikers are entitled to reinstatement upon demand, with backpay if reinstatement is denied, without regard to whether the applications for reinstatement precede or follow the issuance of the Board order. Respondent submits that the case simply does not so hold. On the contrary, the order of the Board enforced in *Fitzgerald* referred to a specific date upon which discrimination occurred and ordered the payment of backpay to certain named individuals for losses which resulted from that discrimination. This case is an excellent illustration of respondent's argument, which is that it is not customary to impose backpay retroactively under a Board order except after a hearing which determines a specific occasion on which an act of discrimination occurred, or, if no discrimination is involved, which fixes the date upon which unfair labor practice strikers unsuccessfully applied for reinstatement.

The Board refers once again to *Mastro Plastics Corp.*

*v. NLRB, supra,* and more specifically footnote 9 in the opinion, as support for the retroactive effect of its order. We have already commented on the inapplicability of *Mastro Plastics Corp.* None of the authorities cited in footnote 9 of the opinion in *Mastro* is authority in opposition to the argument made by respondent under Specification of Error No. 3.

*NLRB v. Waukesha Lime & Stone Co.*, 343 F. 2d 504, appears at page 32 of the Board's brief. In that case the Trial Examiner found that applications for reinstatement were submitted on a date fixed in his report, and the Examiner stated in his opinion that he would recommend reinstatement and backpay from that date. This case is an apt demonstration of respondent's argument. Respondent does not contest the Board's right to order reinstatement and backpay in an 8(a)(5) case. But no precedent has been cited for the enforcement of a reinstatement and backpay order by requiring the payment of backpay from the date of applcations submitted before the date of the order unless the record contains evidence which affords the Board a basis upon which to determine that applications for reinstatement were actually submitted before the date of the order. When this occurs, there can be no misunderstanding of the order since the respondent's obligations are clearly defined.

*Stewart Die Casting Corp. v. NLRB*, 114 F. 2d 849, cited at page 32 of the Board's brief, demonstrates the correctness of respondent's contention under Specification of Error No. 3. The *Stewart* case is a discrimination case, The employer violated Section 8(a)(3) of the Act by denying reinstatement on the 24th of June 1937 to 165 named employees "because of their membership in and activity on

behalf of the union". This case demonstrates the distinction between the type of order it involved and the type of order which the Board issued against Rutter Rex.

In footnote 18 at page 32 of its brief, the Board states that the company is in error in contending at page 59 of the company's brief "that backpay can run retrospective of the Board's order only in cases of discrimination against strikers in violation of 8(a)(3) of the Act". That is not a proper statement of respondent's position. It is not only in 8(a)(3) cases involving discrimination in which a backpay order may be retroactively applied, but also in other cases "in which the Board order expressly fixes the date from which backpay will run * * *" (page 59 of respondent's brief).